Supreme Court, U.S.
FILED

No. 04-1317 MAR 30 2005

OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

YVONNE M. BOHAC,
PETITIONER

V.

THOMAS M. WALSH; SUELTHAUS & WALSH. P.C.; FIRST NATIONAL BANK OF THE MID-SOUTH, NOW MONTGOMERY FIRST NATIONAL BANK; THE BANK OF ADVANCE; MISSOURI DEPARTMENT OF ECONOMIC DEVELOPMENT; SALIM I. AKBANI; AKBANI INDUSTRIES, INCORPORATED; SPORTSWEAR, INCORPORATED; THE UNITED STATES, BY THE ADMINISTRATOR OF THE SMALL BUSINESS ADMINISTRATION,
RESPONDENTS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

JACK F. ALLEN
Counsel of Record
7710 Carondelet Avenue # 400
Clayton, MO 63105
(314) 727-1373
Fax (314) 727-3853
Attorney for Petitioner

CURRY & TAYLOR • WASH D.C. • (202) 223-3160 • USSCINFO.COM

QUESTION PRESENTED FOR REVIEW

Do 15 U.S.C. § 634 (b)(1), 28 U.S.C. § 1346 (b)(1) and 28 U.S.C., § 2680 (h) allow petitioner Yvonne M. Bohac ("Ms. Bohac") to sue The United States, by the Administrator of the Small Business Administration ("SBA"), in a complaint which is based on misrepresentation?

TABLE OF CONTENTS

Page

QUESTION PRESENTED FOR REVIEW i

TABLE OF CONTENTS ii

TABLE OF CITED AUTHORITIES iv

CITATIONS OF THE OFFICIAL AND UNOFFICIAL REPORTS OF THE OPINIONS AND ORDERS ENTERED IN THIS CASE BY COURTS OR ADMINISTRATIVE AGENCIES 1

BASIS FOR JURISDICTION IN THIS COURT 1

THE STATUTES INVOLVED 1

STATEMENT OF THE CASE 2

ARGUMENT 4

CONCLUSION 10

APPENDIX

EIGHTH CIRCUIT OPINION (10/25/04) 1a

DISTRICT COURT OPINION (06/10/03) 5a

DISTRICT COURT JUDGMENT (06/10/03) 11a

EIGHTH CIRCUIT ORDER DENYING REHEARING (12/30/04) 13a

THE STATUTES INVOLVED 14a

APPELLANT'S PETITION FOR A PANEL REHEARING (12/07/04) 20a

DISTRICT COURT ORDER DENYING PLAINTIFF'S MOTION FOR A NEW TRIAL (07/24/03) 27a

PLAINTIFFS MOTION FOR A NEW TRIAL (06/24/03) 28a

PLAINTIFF'S WRITTEN OBJECTIONS TO MAGISTRATE'S REPORT AND RECOMMENDATION (04/17/03) 32a

ORDER AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE (04/03/03) 43a

COMPLAINT FOR DAMAGES (11/25/02) 62a

TABLE OF CITED AUTHORITIES

Page

CASES

CONNECTICUT NATIONAL BANK v. GERMAIN, 503 U.S. 249, 254 (1992) 10

DALEHITE v. UNITED STATES, 346 U.S. 15, 31 (1953) 9

FEDERAL DEPOSIT INSURANCE CORPORATION v. MEYER, 510 U.S. 471 (1994) 9

GRIFFIN v. UNITED STATES, 500 F.2D 1059 (3D CIR. 1974) 8

KOSAK v. UNITED STATES, 465 U.S. 848 (1984) 9

OWNER-OPERATOR FOR INDEPENDENT DRIVERS ASSOCIATION, INC., v. NEW PRIME, INC., 192 F.2D 778, 782 (8TH CIR. 1999) 10

SMITH v. UNITED STATES, 507 U.S. 197, (1993) 8

UNITED STATES v. ORLEANS, 425 U.S. 807, 813 (1976) 9

STATUTES

12 U.S.C. § 1725 (C)(4) (REPEALED 1989) 9

15 U.S.C. § 633 2

15 U.S.C. § 634 ..... i, 2, 4, 6, 9

28 U.S.C. § 1254 1

28 U.S.C. § 1346 ..... *passim*

28 U.S.C. § 2401 ..... 2, 6

28 U.S.C. § 2674 ..... 2, 9

28 U.S.C. § 2679 ..... 2, 6, 9

28 U.S.C. § 2680 ..... *passim*

60 Stat. 842, 845 (1946) 7

RULES

Fed.R.Civ.P. 13(a) 5

OTHER AUTHORITIES

Traver, Anatomy of a Murder 36 8

Quinton, The Federal Tort Claims Act: An Overview (http:www.quintonpetix.com/fedtorac.htm) 8

CITATIONS OF THE OFFICIAL AND UNOFFICIAL REPORTS OF THE OPINIONS AND ORDERS ENTERED IN THIS CASE BY COURTS OR ADMINISTRATIVE AGENCIES

The Eighth Circuit opinion of October 25, 2004 is published at 386 F.3d 859 and is attached at App. 1a. The district court order of June 10, 2003 is unpublished and is attached at App. 5a. The Eighth Circuit order denying rehearing entered December 30, 2004 is attached at App. 13a.

BASIS FOR JURISDICTION IN THIS COURT

(I) The date the judgment sought to be reviewed was entered was on October 25, 2004. (App. 1a)

(ii) The date of the order respecting the rehearing was December 30, 2004. The petition for rehearing was denied. (App. 13a)

(iii) Not applicable.

(iv) 28 U.S.C. § 1254 (1)

(v) Not applicable.

THE STATUTES INVOLVED

The statutory provisions referred to below are lengthy. Their pertinent texts are set out verbatim in the appendix from 14a through 19a.

The citations of the statutes involved are:

15 U.S.C. § 633 (a) and (b)(1) Small Business Administration.

15 U.S.C. § 634 (b)(1). General powers, powers of administrator.

28 U.S.C. § 1346. (b)(1). United States as defendant.

28 U.S.C. § 2401. Time for commencing action against United States.

Title IV - Federal Tort Claims Act, Part 1 - Short title and definitions, Short title, Sec. 401. How title may be cited, One year statute of limitations, Sec. 420 [60 Stat. 842, 845 (1946)]

28 U.S.C. § 2674. Liability of United States

28 U.S.C. § 2679 (a) and (b)(1) and (2)(A) and (B). Exclusiveness of remedy.

28 U.S.C. § 2680 and 2680 (h). Exceptions.

STATEMENT OF THE CASE

Ms. Bohac and Salim I. Akbani ("Mr. Akbani") were married from 1982 until May 1997. In 1995, they co-signed loan guarantees for Mr. Akbani's two corporations, Akbani Industries, Incorporated and Sportswear, Incorporated. Ms. Bohac later learned that Mr. Akbani had engaged in bank fraud (check kiting) from October to December 1994.

In 1998, creditors foreclosed on properties of Ms. Bohac, Mr. Akbani and his corporations. He filed a Chapter 7 bankruptcy petition, but many of his debts were not dischargeable. Ms. Bohac claims she is liable to pay at least $1,948,767 as a result of her signing the loan guarantees.

On November 25, 2002, Ms. Bohac filed a complaint against nine defendants: (1) Thomas M. Walsh, (2) Suelthaus & Walsh, P.C., (3) First National Bank of the MidSouth (now known as Montgomery First National Bank), (4) The Bank of Advance, (5) Missouri Department of Economic Development, (6) Mr. Akbani, (7) Akbani Industries, Incorporated, (8) Sportswear, Incorporated, and (9) The United States, by the Administrator of the Small Business Administration ("SBA"). She alleged that each defendant knew of Mr. Akbani's check kiting activities and failed to warn her, and that their silence constituted fraud. Had she known of the bank fraud (check kiting), she would not have signed the guarantees and then the refinancing would not have gone through.

She first discovered the fraud perpetrated on her by the defendants on Monday morning, November 24, 1997.

The district court dismissed the claim against the SBA, holding that The United States was entitled to sovereign immunity. The district court dismissed the claims against the rest of the defendants for lack of subject matter jurisdiction.

The Eighth Circuit affirmed the decision of the district court.

ARGUMENT

The Eighth Circuit in this case has decided an important question of law that has not been, but should be, settled by this Court. Specifically, the question is can Ms. Bohac, the petitioner, sue The United States, by the Administrator of the SBA, in a complaint which is based on misrepresentation?

Although no one involved with this case has specifically stated that it is one of first impression, the clear implication is that it is one of first impression. (App. 21a) Hence the absence of cases which are in point.

This case was decided solely on the basis of motions to dismiss. No evidence was taken.

Petitioner contends, and has contended, that her complaint based on misrepresentation (and deceit) falls within the confines of 28 U.S.C. § 2680 (h), which effectively removes her action from the Federal Tort Claims Act ("FTCA"). Given that § 2680 provides that "The provisions of this chapter (chapter 171) and § 1346 (b) of this title (28) shall not apply to . . . (h) any claim arising out of . . . misrepresentation (and/or) deceit," we contend that Ms. Bohac can sue SBA under 15 U.S.C. § 634 (b)(1), which provides in part that:

> **(b) Powers of Administrator.**
>
> In the performance of, and with respect to, the functions, powers, and duties vested in him by this chapter, the Administrator (of SBA) may -

> (1) sue and be sued in any court of record of a state having general jurisdiction, or in any United States District Court, and jurisdiction is conferred upon such district court to determine such controversies without regard to the amount in controversy; but no attachment, injunction, garnishment, or other similar process, mesne or final, shall be issued against the Administrator or his property;
>
> . . .

(Given that Ms. Bohac may obtain a judgment against SBA, what effect could it have? We contend that it is very important, since with a judgment against SBA, Ms. Bohac would have a set-off against SBA, which currently claims an indebtedness against Ms. Bohac of $800,000+ which presumably would have to be the subject of a compulsory counterclaim. [Fed.R.Civ.P. 13(a)] Subparagraph (d) of Rule 13 has no application. A federal intercept is also in effect as to Ms. Bohac, which can reach her income tax refunds. A judgment against SBA would nullify the intercept. [App. 38a-39a])

When the case was before the magistrate, SBA moved to dismiss or, in the alternative, for summary judgment, arguing that Ms. Bohac (1) failed to plead waiver of sovereign immunity or the basis for subject matter jurisdiction, (2) failed to file her administrative claim with the appropriate agency within the two year statute of limitations of the FTCA, 28 U.S.C. §§ 1346 (b) and 2671-80, which allege causes of action that are specifically excluded from the FTCA and for which the United States has not waived sovereign immunity.

Although 28 U.S.C. § 2401 was not specifically mentioned in SBA's motion, SBA did file a statement of "uncontroverted material facts" claiming that Ms. Bohac did not allege that she filed an administrative complaint pursuant to the FTCA and that she did not file an administrative complaint as required by the FTCA.

Ms. Bohac answered that the statement of "uncontroverted material facts" was incorrect and that she was entitled to bring suit under 15 U.S.C. § 634 (b)(1).

The magistrate (App. 53a-55a), the district court (App. 7a-8a) and the Eighth Circuit (App. 2a-3a) all ruled against Ms. Bohac's claim.

The basis of the holdings of the Eighth Circuit and the district court was that

> . . . Fraud is a tort for which only the FTCA can potentially provide a cause of action against the United States and a waiver of the government's immunity. See 28 U.S.C. § 2679 (a) and § 1346 (b). § 2679 (a) expressly states that this is so notwithstanding the provision of 15 U.S.C. § 634 (b)(1) authorizing the Administrator of the SBA to "sue and be sued." (App. 2a-3a, 7a)

The Eighth Circuit and the district court also mentioned 28 U.S.C. § 2401 (b), which provides that a claim must first be filed with the appropriate agency within two years following the accrual of the cause of action. Assuming that the claim is denied, the claimant has six months to file suit from "the date of mailing, by

certified or registered mail, of notice of final denial of the claim by the agency to which it was presented." (App. 16a)

Although all of the parties assumed that Ms. Bohac did not file a claim with the SBA (whether the claim was filed under the FTCA or whether a generic claim was filed under § 2401), evidence has only recently been uncovered showing that Ms. Bohac did in fact file a claim with the SBA (in the form of a letter) on April 10, 1998, and that SBA mailed a letter to Ms. Bohac on February 20, 2002, notifying her that her claim ("a settlement offer") had been considered and that SBA "has declined to release (her) from (her) obligation towards the above referenced loan."[1]

SBA's letter may have amounted to a denial of her claim, but the denial was not mailed by "certified or registered mail," as required by § 2401 (b).

Six months and 19 days later, SBA reiterated its denial by its letter of September 9, 2002, to Ms. Bohac - which again was not sent by certified or registered mail.

We still have the important question of federal law to dispose of, i.e., if 28 U.S.C. § 2680 (h) has taken a claim for misrepresentation and/or deceit out of the FTCA, may the claimant proceed under another waiver of sovereign immunity and can the claimant proceed without regard to the provisions of the FTCA.

---

[1] Ms. Bohac is not abandoning her contention made in the Eighth Circuit (App. 23a-24a), i.e., that because § 2401 was originally § 420 in the 1946 FTCA (60 Stat. 842, 845), it should be considered a part of the current FTCA and therefore is subject to 28 U.S.C. § 2680. The governing statute of limitations as to SBA is § 2401 (a), not § 2401 (b).

The accepted wisdom has been that relief from fraud can only be obtained through the FTCA, and this cannot be done because of § 2680 (h), the result is that no relief (from fraud) can be obtained from The United States.

Fortunately, "the considered wisdom" is the equivalent in this case of an "urban myth," or "one of those dearly hugged folk myths that people regularly die for," as described in Traver, Anatomy of a Murder 36, e.g., "that raw rhubarb is good for (an embarrassing disease) or that all chorus girls (are sexually active) or that night air is bad."

An example of the "urban myth/folk myth" is a statement contained in Quinton, The Federal Tort Claims Act: An Overview (http:www.quintonpetix.com/fedtorac.htm):

> The FTCA includes specific, enumerated exceptions in 28 U.S.C. § 2680. If an exception applies, the United States may not be sued and litigation based upon an exempt claim is at an end. . . .

Following the quotation, Mr. Quinton lists five cases purportedly in proof of his all-encompassing statement:

> Griffin v. United States, 500 F.2d 1059 (3d Cir. 1974);
>
> Smith v. United States, 507 U.S. 197 (1993);
>
> Kosak v. United States, 465 U.S. 848 (1984);

United States v. Orleans, 425 U.S. 807, 813 (1976) and

Dalehite v. United States, 346 U.S. 15, 31 (1953).

However, none of these cases involves the circumstances where the claimant sought damages arising out of one of the several exceptions under § 2680 and at the same time where there is an alternative avenue of relief, e.g., another waiver of sovereign immunity, per 15 U.S.C. § 634 (b)(1).

Federal Deposit Insurance Corporation v. Meyer, 510 U.S. 471 (1994), is a case standing for the proposition that a sue and be sued clause in the statute creating the Federal Savings and Loan Insurance Corporation in 1934 [12 U.S.C. § 1725 (c)(4) (repealed 1989)] can be affected by a provision in the FTCA. The clause gave FSLIC a broad waiver of sovereign immunity, but it could be set aside by 28 U.S.C. § 2679 (a), Exclusiveness of remedy (App. 18a), together with 28 U.S.C. § 1346 (b)(1). This is the position taken by the Eighth Circuit (App. 2a-3a) and the district court (App. 7a).

But the Eighth Circuit and the district court both overlooked the effect of § 2680, which provides that "The provisions of this chapter and § 1346 (b) of this title shall not apply (to claims arising out of misrepresentation and/or deceit)." (Emphasis added.) The FTCA and § 1346 are bodily lifted out of the statute books insofar as misrepresentation and deceit cases are concerned.

The nonapplication of the FTCA and § 1346 (b) to cases involving misrepresentation and deceit means that

the individual sections in the FTCA, e.g., §§ 2679, 2674 and 1346 (b) cannot be used as any authority in a misrepresentation and/or deceit case.

CONCLUSION

The Eighth Circuit, the district court and the magistrate assumed that Ms. Bohac is bound by the FTCA, which cannot apply given 28 U.S.C. § 2680 (h). (App. 2a-3a, 7a and 53a-55a)

The efforts of the Eighth Circuit, the district court and the magistrate in trying to bring the FTCA into this case ignore the well-known plain meaning rule, which is exemplified by 28 U.S.C. § 2680. See Connecticut National Bank v. Germain, 503 U.S. 249, 254 (1992) and Owner-Operator for Independent Drivers Association, Inc., v. New Prime, Inc., 192 F.2d 778, 782 (8th Cir. 1999).

§ 2680 (h) effectively nullifies § 2679, the entire FTCA and the first ten words of § 1346 (b) as to the present case.

The petition should be granted.

Dated March 30, 2005.

Respectfully submitted,

Jack F. Allen
Counsel of Record
7710 Carondelet Avenue # 400
Clayton, Missouri 63105
314.727.1373
Fax 314.727.3853
Attorney for Petitioner

(Any footnotes trail at the end of each document)

No. 03-3432

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Yvonne M. Bohac,
Plaintiff - Appellant,

v.

Thomas M. Walsh; Suelthaus & Walsh; First National Bank of the Mid-South; Department of Economic Development; Salim I. Akbani; Akbani Industries, Inc.; Sportswear, Incorporated; By the Administrator of the United States of America, also known as Small Business Administration (sic)
Defendants - Appellees.

May 13, 2004, Submitted
October 25, 2004, Filed

Before MORRIS SHEPPARD ARNOLD, BEAM, and MELLOY, Circuit Judges.

MELLOY, Circuit Judge.

Yvonne M. Bohac ("Bohac") and Salim I. Akbani ("Akbani") were married from 1982 until May 1997. In 1995, Bohac and Akbani co-signed loan guarantees of Akbani's two corporations, Akbani Industries, Inc. and Sportswear, Incorporated. Bohac later learned that her husband had engaged in bank fraud (check kiting) from October to December 1994. In 1998, creditors foreclosed

on properties of Bohac, Akbani and Akbani's corporations. Akbani filed Chapter 7 bankruptcy, but many of his debts were not dischargeable. Bohac claims she is liable to pay at least $ 1,948,767 as a result of signing the loan guarantees.

On November 25, 2002, Bohac filed a complaint against nine defendants: (1) Thomas M. Walsh, (2) Suelthaus & Walsh, P.C., (3) First National Bank of the MidSouth, (4) The Bank of Advance, (5) Missouri Department of Economic Development, (6) Akbani, (7) Akbani Industries, Inc., (8) Sportswear, Incorporated, and (9) the United States of America (sic), by the Administrator of the Small Business Administration ("Small Business Administration"). She alleged that each defendant knew of Akbani's check kiting activities and failed to warn her, and that their silence constituted fraud. The district court dismissed the claim against the Small Business Administration, holding that the United States was entitled to sovereign immunity. The district court n1 dismissed the claims against the rest of the defendants for lack of subject matter jurisdiction.

We agree with the district court that sovereign immunity bars Bohac's claim against the Small Business Administration. As the district court succinctly stated:

Plaintiff's claim is one for fraud. Fraud is a tort for which only the Federal Tort Claims Act can potentially provide a cause of action against the United States and a waiver of the government's sovereign immunity. See 28 U.S.C. § 2679(a) and § 1346(b). Section 2679(a) expressly states that this is so notwithstanding the

provision of 15 U.S.C. § 634(b)(1) authorizing the Administrator of the SBA to "sue and be sued."

District Court Opinion at 3-4.

In addition, even if Bohac's claim was cognizable under the Federal Tort Claims Act, it is procedurally defaulted because she failed to exhaust her administrative remedies. Under the Federal Tort Claims Act, a claimant must present her "claim to the appropriate Federal agency" and the agency must make a final decision before the claimant may bring an action against the United States. 28 U.S.C. § 2675(a). Further, "[a] tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues." 28 U.S.C. § 2401(b). It is undisputed that Bohac failed to file an administrative claim with the Small Business Administration prior to bringing suit against the United States. Her claim against the Small Business Administration is therefore barred.

As to the remaining defendants, the plaintiff has not stated any basis for federal jurisdiction. In fact, it does not appear that the plaintiff appealed the district court's decision to decline to exercise supplemental jurisdiction. To the extent that it was appealed, we affirm the district court.

The judgment of the district court is therefore affirmed.

Footnotes

n1 The Honorable Donald J. Stohr, United States District Judge for the Eastern District of Missouri.

No. 4:02CV1775-DJS

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

YVONNE M. BOHAC,
Plaintiff,

vs.

THOMAS M. WALSH, SUELTHAUS & WALSH, P.C., FIRST NATIONAL BANK OF THE MID-SOUTH, THE BANK OF ADVANCE, MISSOURI DEPARTMENT OF ECONOMIC DEVELOPMENT, SALIM I. AKBANI, AKBANI INDUSTRIES, INCORPORATED, SPORTSWEAR INCORPORATED, and the UNITED STATES by the ADMINISTRATOR OF THE SMALL BUSINESS ADMINISTRATION,
Defendants.

Filed June 10, 2003

ORDER

Plaintiff's complaint alleges that it asserts claims arising under 28 U.S.C. 1346(b), regarding federal court jurisdiction over claims against the United States, and 15 U.S.C. 634(b)(1), providing that the Administrator of the Small Business Administration may sue and be sued. The complaint does not allege the existence of federal diversity jurisdiction. The complaint is not pled in counts, but instead presents a long narrative including the following allegations.

Plaintiff was married to defendant Akbani for 13 (sic – should be 15 years – see the opening sentence of the Eighth Circuit Opinion at 1a) years until May 22, 1997. In August 1994, a Small Business Administration ("SBA") loan to Akbani and his defendant businesses, guaranteed by plaintiff, was declared to be in default. Defendant Bank of Advance and others arranged a refinancing, and in January and February 1995 plaintiff was called into the law offices of defendant Suelthaus & Walsh to sign various financing papers, including new guarantees. Defendant Walsh "and another" told plaintiff that if she did not sign the papers, Akbani would go to jail for defaulting on the loan. Plaintiff was told that defendants SBA, the Bank of Advance and the Missouri Department of Economic Development wanted to keep Akbani's companies' employees working and off of welfare. Plaintiff relied on those representations and signed the guarantees based on them.

Defendants did not tell plaintiff that Akbani had engaged in bank fraud (check kiting) from approximately October 1994 to December 1994. Plaintiff alleges that, because of their superior knowledge not reasonably available to plaintiff, defendants were under a legal obligation to advise her of Akbani's fraudulent activities, and their silence constituted fraud. Plaintiff did not learn of Akbani's conviction on fraud charges until November 24, 1997. In the spring of 1998, creditors foreclosed on the properties of plaintiff, Akbani and the companies, and plaintiff is liable on the guarantees. Plaintiff pleads damages including the $1,948,767 which she was "seduced to guarantee the obligation to repay" as well as "untold damages in connection with the dissolution

of her marriage and events occurring after the dissolution." Complaint [Doc. #1], 9 ¶16. Now before the Court are a number of motions to dismiss, as well as an order and recommendation ("O&R") from the United States Magistrate Judge to whom the case was originally assigned.

United States' Motion to Dismiss or for Summary Judgment

The United States challenges the complaint as failing to plead or establish a waiver of sovereign immunity, for plaintiff's failure to satisfy the Federal Tort Claims Act's administrative exhaustion requirements, and on the ground that the United States has not waived its sovereign immunity for fraud claims. The magistrate judge's legal analysis of these issues appears to this Court to be entirely correct. Plaintiff's arguments in opposition to the motion and in her objections to the O&R betray a lack of understanding of the applicable legal principles.

Giving the matter de novo consideration in light of plaintiff's objections, the Court concludes that plaintiff's claim against the United States and SBA must be dismissed. Plaintiff's claim is one for fraud. Fraud is a tort for which only the Federal Tort Claims Act can potentially provide a cause of action against the United States and a waiver of the government's sovereign immunity. See 28 U.S.C. §2679(a) and §1346(b). Section 2679(a) expressly states that this is so notwithstanding the provision of 15 U.S.C. §634 (b) (1) authorizing the Administrator of the SBA to "sue and be sued."

Plaintiff misunderstands the ramifications of the FTCA "Exceptions" set forth in 28 U.S.C. §2680(h). A tort claim excepted in this provision, other than those Bivens claims against law enforcement officers which are the subject of a special proviso not applicable here, cannot be brought against the United States for lack of a waiver of its otherwise applicable sovereign immunity. Among those torts listed are misrepresentation and deceit. If plaintiff's fraud claim falls within the meaning of those terms in §2680(h), her claim is barred by the government's sovereign immunity. Muniz-Rivera v. United States, 326 F.3d 8, 13 (1st Cir. 2003); JBP Acquisitions LP v. United States, 224 F.3d 1260, 1263-64 (11th Cir. 2000). If it does not, it is defeated by plaintiff's undisputed failure to timely present the claim to the affected federal agency within two years, as required by §2675(a) and §2401(b). For all these reasons, plaintiff's claims against the United States and the SBA will be dismissed.

Subject Matter Jurisdiction over the Remaining Claims & Defendants

As indicated above, the complaint does not expressly allege the basis of the Court's subject matter jurisdiction. The two statutory provisions cited in the complaint, 28 U.S.C. §1346(b) and 15 U.S.C.§634 (b)(1), only have any application as to the claims against the United States, which are to be dismissed. The Court's federal question jurisdiction does not appear to extend to plaintiff's fraud claims against the remaining defendants, and no basis for federal jurisdiction over plaintiff's fraud claims against the remaining defendants is pled.

Federal diversity jurisdiction requires complete diversity of citizenship between plaintiff and all defendants. The complaint alleges the residence, but not the citizenship, of some but not all of the parties. Even so, these allegations suggest the lack of diversity in that plaintiff and defendant Akbani are both residents of Illinois. If plaintiff were to allege that, despite her current residence, she is a Missouri citizen, a number of the defendants appear likely to be Missouri citizens, which would also defeat diversity. To the extent that the Court's supplemental jurisdiction might be thought to apply to plaintiff's claims against the remaining defendants, the Court would decline to exercise such jurisdiction under §1367(c)(3) upon the dismissal herewith of the only claims over which it had original jurisdiction.

Therefore, in addition to dismissing plaintiff's claims against the United States and the SBA with prejudice for lack of jurisdiction and for failure to state a claim upon which relief may be granted, the Court will dismiss the remainder of the complaint for lack of federal subject matter jurisdiction. In so doing, the Court will deny without prejudice as moot all the other pending motions to dismiss.

Accordingly,

IT IS HEREBY ORDERED that plaintiff's objections [Doc. #64] are overruled and the magistrate judge's recommendation [Doc. #62] is accepted and adopted as to the United States' motion to dismiss or for summary judgment. In all other respects, the recommendation is moot in view of the dismissal of the remainder of the complaint on other grounds.

IT IS FURTHER ORDERED that the motion of the United States and Small Business Administrator to dismiss or for summary judgment [Doc. #0] is granted.

IT IS FURTHER ORDERED that all other pending motions are denied without prejudice as moot.

Dated this 10th day of June, 2003.

UNITED STATES DISTRICT JUDGE

No. 4:02CV1775-DJS

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

YVONNE M. BOHAC,
Plaintiff,

vs.

THOMAS M. WALSH, SUELTHAUS & WALSH, P.C., FIRST NATIONAL BANK OF THE MID-SOUTH, THE BANK OF ADVANCE, MISSOURI DEPARTMENT OF ECONOMIC DEVELOPMENT, SALIM I. AKBANI, AKBANI INDUSTRIES, INCORPORATED, SPORTSWEAR INCORPORATED, and the UNITED STATES by the ADMINISTRATOR OF THE SMALL BUSINESS ADMINISTRATION,
Defendants.

Filed June 10, 2003

JUDGMENT

Pursuant to the order entered herein this day,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that plaintiff's claims against the United States and the Administrator of the Small Business Administration are dismissed with prejudice for lack of jurisdiction and for failure to state a claim upon which relief may be granted.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the remainder of plaintiff's complaint is dismissed for lack of federal subject matter jurisdiction.

Dated this 10th day of June, 2003.

UNITED STATES DISTRICT JUDGE

No. 03-3432

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Yvonne M. Bohac,
Appellant,

v.

Thomas M. Walsh, et al.,
Appellee. (sic)

December 30, 2004, Decided

OPINION: The petition for rehearing by the panel filed by Appellant Bohac is denied.

December 30, 2004

15 U.S.C. Section 633. Small Business Administration

(a) Creation; principal, branch, and regional offices

In order to carry out the policies of this chapter there is created an agency under the name "Small Business Administration" (herein referred to as the Administration), which Administration shall be under the general direction and supervision of the President and shall not be affiliated with or be within any other agency or department of the Federal Government. The principal office of the Administration shall be located in the District of Columbia. The Administration may establish such branch and regional offices in other places in the United States as may be determined by the Administrator of the Administration. As used in this chapter, the term "United States" includes the several States, the Territories and possessions of the United States, the Commonwealth of Puerto Rico, the Trust Territory of the Pacific Islands, and the District of Columbia.

(b) Appointment of Administrator, Deputy Administrator, and Associate Administrators; duties of Administrator: preparation of data base and publication of economic indices and annual report; risk management database; computer security and education program

(1) The management of the Administration shall be vested in an Administrator who shall be appointed from civilian life by the President, by and with the advice and consent of the Senate, and who shall be a person of outstanding qualifications known to be familiar and sympathetic with small-business needs and problems. . .

15 U.S.C. Section 634. General powers

. . .

(b) Powers of Administrator

In the performance of, and with respect to, the functions, powers, and duties vested in him by this chapter the Administrator may -

(1) sue and be sued in any court of record of a State having general jurisdiction, or in any United States district court, and jurisdiction is conferred upon such district court to determine such controversies without regard to the amount in controversy; but no attachment, injunction, garnishment, or other similar process, mesne or final, shall be issued against the Administrator or his property;

. . .

28 U.S.C. Section 1346. United States as defendant

. . .

(b)(1) Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United

States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. Section 2401. Time for commencing action against United States

(a) Except as provided by the Contract Disputes Act of 1978, every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues. The action of any person under legal disability or beyond the seas at the time the claim accrues may be commenced within three years after the disability ceases.

(b) A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues or unless action is begun within six months after the date of mailing, by certified or registered mail, of notice of final denial of the claim by the agency to which it was presented.

TITLE IV – FEDERAL TORT CLAIMS ACT
Part 1 – Short Title and Definitions
Short title

Sec. 401. This title may be cited as the "Federal Tort Claims Act."

. . .

ONE YEAR STATUTE OF LIMITATIONS

Sec. 420. Every claim against the United States cognizable under this title shall be forever barred, unless within one year after such claim accrued or within one year after the date of enactment of this Act, whichever is later, it is presented in writing to the Federal agency our of whose activities is arises, if such claim is for a sum not exceeding $1,000; or unless within one year after such claim accrued or within one year after the date of enactment of this Act, whichever is later, an action is begun pursuant to part 8 of this title. In the event that a claim for a sum not exceeding $1,000 is presented to a Federal agency as a foresaid, the time to institute a suit pursuant to part 3 of this title shall be extended for a period of six months from the date of mailing of notice to the claimant by such Federal agency as to the final disposition of the claim or from the date of withdrawl of the claim from such Federal agency pursuant to section 410 of this title, if it would otherwise expire before the end of such period.

60 Stat. 842, 845 (1946)

28 U.S.C. Section 2674. Liability of United States

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

. . .

28 U.S.C. Section 2679. Exclusiveness of remedy

(a) The authority of any federal agency to sue and be sued in its own name shall not be construed to authorize suits against such federal agency on claims which are cognizable under section 1346(b) of this title, and the remedies provided by this title in such cases shall be exclusive.

(b)(1) The remedy against the United States provided by sections 1346(b) and 2672 of this title for injury or loss of property, or personal injury or death arising or resulting from the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment is exclusive of any other civil action or proceeding for money damages by reason of the same subject matter against the employee whose act or omission gave rise to the claim or against the estate of such employee. Any other civil action or proceeding for money damages arising out of or relating to the same subject matter against the employee or the employee's estate is precluded without regard to when the act or omission occurred.

(2) Paragraph (1) does not extend or apply to a civil actionagainst an employee of the Government -

(A) which is brought for a violation of the Constitution of the United States, or

(B) which is brought for a violation of a statute of the United States under which such action against an individual is otherwise authorized.

. . .

28 U.S.C. Section 2680. Exceptions

The provisions of this chapter and section 1346(b) of this title shall not apply to -

. . .

(h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights:

Provided, That, with regard to acts or omissions of investigative or law enforcement officers of the United States Government, the provisions of this chapter and section 1346(b) of this title shall apply to any claim arising, on or after the date of the enactment of this proviso, out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution. For the purpose of this subsection, "investigative or law enforcement officer" means any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law.

. . .

03-3432

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Yvonne M. Bohac, Plaintiff-Appellant

vs.

Thomas M. Walsh, et al, Defendants-Appellees

APPELLANT'S PETITION FOR
A PANEL REHEARING

Jack F. Allen 63454
Attorney for Appellant
7710 Carondelet Avenue # 400
Clayton, Missouri 63105
314.727.1373
Fax 314.727.3853

APPELLANT'S PETITION FOR A PANEL REHEARING

Appellant Yvonne M. Bohac, per FRAP 40 and Rule 40A, petitions the court to order a rehearing by the panel which initially decided this appeal. The court in the opinion handed down on October 25, 2004, has overlooked Ms. Bohac's main point of law, i.e., the interplay among 15 U.S.C. § 634 (b)(1) on the one hand, and 28 U.S.C. § 1346 (b)(1) and 28 U.S.C. § 2680 (h) on the other, which together demonstrate that the United States, by the administrator of the Small Business

Administration (SBA), is susceptible to suit in a fraud case.

Ms. Bohac accordingly makes the following argument in support of this rehearing petition:

1. Although no one involved in this case has specifically stated that it is one of first impression, the clear implication is that it is one of first impression. We are also faced with a triple negative effected by 28 U.S.C. §§ 1346 (b)(1), 2679 (a) and 2680 (h), followed by a positive, 15 U.S.C. § 634 (b)(1).

2. The first negative [28 U.S.C. § 1346 (b)(1)] gives to the district courts, etc., exclusive jurisdiction of actions on claims against the United States, "subject to the provisions of Chapter 171 of this title (the Federal Tort Claims Act)."

3. The second negative is 28 U.S.C. § 2679 (a), which provides that the "remedies provided by this title (apparently referring to the original Title IV [the FTCA] at 60 Stat. 842-46, now Chapter 171 of Title 26 of U.S.C.) shall be exclusive in cases cognizable under § 1346 (b) where the federal agency involved can "sue and be sued in its own name." In this case we were dealing with SBA, which is not an independent agency, and accordingly cannot sue and be sued in its own name.

4. The third negative, § 2680 (h), provides that the provisions of the FTCA (Chapter 171) and 28 U.S.C. § 1346 (b) shall not apply to any claim arising out of misrepresentation or deceit, together with other enumerated kinds of claims. § 2680 (h) does not bar misrepresentation cases in all instances. It simply

provides that the FTCA and § 1346 (b) do not apply in misrepresentation cases. We contend that misrepresentation cases can be brought against the United States if there is another waiver of sovereign immunity, i.e., the "sue and be sued" provision in 15 U.S.C. § 634 (b)(1).

5. (a) The final effect of § 2680 is that the proviso in § 1346 (b)(1) ("Subject to the provisions of chapter 171 of this title") is eliminated from § 1346 (b)(1), insofar as fraud cases are concerned. The rest of the section is left intact. The district courts have exclusive jurisdiction of civil actions against the United States for money damages for injury or loss of property.

(b) As to the so-called exclusiveness of remedy § 2679 (a), this section is effectively eliminated by § 2680 insofar as fraud cases are concerned because § 2679 is a part of Chapter 171.

(c) In each instance, § 2680 (h) effectively takes the provision § 1346 (b)(1) and the FTCA (Chapter 171) out of play in fraud cases.

6. This court committed error in quoting from the district court's opinion at 3-4, to the effect that "Plaintiff's claim is one for fraud. Fraud is a tort for which only the Federal Tort Claims Act can potentially provide a cause of action against the United States and a waiver of the government's sovereign immunity." The district court ignored the clear effect of § 2680.

7. Up to this point, we are faced with a logical impossibility. If "fraud is a tort for which only the FTCA can potentially provide relief," a claimant who

has been damaged by misrepresentation or deceit, as is Ms. Bohac's case, would never be able to recoup her losses, since fraud cases cannot fall within the FTCA.

8. However, against the three negatives, we have a clear positive in 15 U.S.C. § 634 (b)(1), which expressly provides that the administrator of SBA, in the performance of and with respect to the functions, powers and duties vested in him, may "sue and be sued in any court of record of a state having general jurisdiction, or in any United States District Court, and Jurisdiction is conferred upon such district court to determine such controversies without regard to the amount in controversy." (Emphasis added.)

9. Insofar as the present fraud case is concerned, the entire FTCA is a nonentity [except for 28 U.S.C. 2680 (h) itself and the other parts of § 2680].

10. (a) We agree that in cases which are cognizable under the FTCA, the SBA section [15 U.S.C. § 634 (b)(1)] would be of no effect. The procedures in the FTCA would have to be followed. A claim would first have to be filed with the appropriate federal agency within the two years after the claim accrued, and if the claim was denied by the agency, suit would have to be brought within six months after the notice of the denial. [28 U.S.C. § 2401. (b)]

(b) 28 U.S.C. § 2401 (b), the statute of limitations, was originally § 420 of the FTCA. (60 Stat. 845) The language of § 420 then read "Every claim against the United States under this title (the FTCA) shall be forever barred," (unless a claim is filed within one year

after the claim is denied; suit must be filed within six months after the denial).

(c) The statute of limitations section was then moved from the body of the original Act (now codified as Chapter 171 of 28 U.S.C.) to chapter 161 by the codifiers. Whether the section was properly removed from the body of the original FTCA to another chapter, it is not logically placed. It still describes the claim procedure of the FTCA, which does not apply to fraud cases. United States National Bank of Oregon v. Independent Insurance Agents of America Inc., 508 U.S. 439, 448 (1993) and Abell v. United States, 518 F.2d 1369, 1377 (Ct.Cl. 1975).

(d) Since the Statutes at Large prevail over the language of the United States Code, Chapter 171 is preempted in its entirety by 28 U.S.C. § 2680 (except for 28 U.S.C. § 2680 itself), as is 28 U.S.C. § 2401 (b), which originally was § 420 of the FTCA (60 Stat. 845).

11. 28 U.S.C. § 2680 (h), which specifically provides that the FTCA and § 1346 (b) do not apply to cases involving misrepresentation and deceit, leaves standing free the SBA "sue and be sued" provision in 15 U.S.C. § 634 (b)(1). We therefore find ourselves with a clear and complete waiver of any governmental immunity. The waiver is not limited to any particular kin of cases.

12. This court did an accurate job in briefly summarizing the salient facts in this case. But it fell into error in adopting the district court language that "Section 2679 (a) expressly states that this is so (that only the FTCA can provide a cause of action against the United States and a waiver of the sovereign immunity)

notwithstanding the provision of 15 U.S.C. § 634 (b)(1) authorizing the administrator of the SBA to 'sue and be sued.'" (Opinion, p. 2)

13. A reference to 15 U.S.C. § 634 (b)(1) does not appear any place in 28 U.S.C. § 2679, specifically or by any kind of description. § 2679 (b)(1) does mention §§ 1346 (b) and 2672. § 2672 is also a part of FTCA, which is made inapplicable to the present case by § 2680 (h), together with 28 U.S.C. § 1346 (b).

14. It is noteworthy that this court cited no case or section in support of its opinion, except for the language of the district court opinion at the bottom of page 2, which has already been described as error.

Conclusion

Because of the interplay among 15 U.S.C. § 634 (b)(1), 28 U.S.C. § 1346 (b)(1) and 28 U.S.C. § 2680 (h), the United States by the administrator of the Small Business Administration is susceptible to suit in a fraud case.

It is interesting that Mueller v. Abdnor, 765 F.Supp. 551 (E.D. Mo.), aff'd in part and rev'd in part, 972 F.2d 931 (8th Cir. 1992), cited by Ms. Bohac in her first appellant's brief, which involved a suit against the administrator of the SBA for breach of contract under 15 U.S.C. § 634 (b)(1) (972 F.2d at 931), followed by the administrator's counterclaim against the plaintiff for slander of title, was similarly allowed by this court and the district court below. (765 F.Supp. at 551) The administrator of SBA would not be required to file his counterclaim under the FTCA (28 U.S.C. § 2674). The

counterclaim would clearly fall within the coverage of 15 U.S.C. § 634 (b)(1), which provides that SBA by its administrator can "sue and be sued."

There is no limit on the kind of suits brought against and brought by the administrator of SBA. If SBA can bring a counterclaim for slander of title (fraud), the same kind of suit can be brought against SBA.

The petition for a panel rehearing should be granted.

WHEREFORE, Ms. Bohac petitions the court to order a rehearing by the panel which initially decided this appeal, for the reasons stated above, together with any other relief which the court may deem appropriate.

Dated: December 7, 2004.

Jack F. Allen 63454
Attorney for Appellant
7710 Carondelet Avenue # 400
Clayton, Missouri 63105
314.727.1373
Fax 314.727.3853

No. 4:02CV01775 DJS

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

YVONNE M. BOHAC,
Plaintiff,

vs.

THOMAS M. WALSH, SUELTHAUS & WALSH, P.C., FIRST NATIONAL BANK OF THE MID-SOUTH, THE BANK OF ADVANCE MISSOURI DEPARTMENT OF ECONOMIC DEVELOPMENT, SALIM I. AKBANI, AKBANI INDUSTRIES, INCORPORATED, SPORTSWEAR INCORPORATED, and THE UNITED STATES by the ADMINISTRATOR OF THE SMALL BUSINESS ADMINISTRATION,
Defendants.

Filed July 24, 2003

ORDER

Upon careful consideration,

IT IS HEREBY ORDERED that plaintiff's motion for a new trial [Doc. #73] is denied.

Dated this 24th day of July, 2003.

UNITED STATES DISTRICT JUDGE

No. 4:02CV01775 DJS

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

YVONNE M. BOHAC,
Plaintiff

vs.

THOMAS M. WALSH, et al,
Defendants

Filed June 24, 2003

PLAINTIFF'S MOTION FOR A NEW TRIAL

Plaintiff Yvonne M. Bohac, per Fed.R.Civ.P. 59 (a)(2), moves the court to grant her a new trial in this case, e.g., to open the judgment, to amend the findings of fact and the conclusions of law or make new findings and conclusions, and direct the entry of a new judgment. specifically, plaintiff asks that the court's order as filed on June 10, 2003, be amended so that the motion of The United States (Small Business Administration) to dismiss or for summary judgment be denied, instead of being granted, and that the recommendation of the magistrate that the motion to dismiss of Walsh and Suelthaus & Walsh, Inc. (sic - should be P.C.), (Doc. 29) be set aside, and that their motion to dismiss be denied.

IN SUPPORT THEREOF, plaintiff avers the following grounds:

1. The order and recommendation of the United States Magistrate Judge David D. Noce was filed on April 3, 2003. Plaintiff's written objections to the magistrate's report and recommendation was received by the court on April 17, 2003. The court's order accepting the magistrate's recommendations was filed on June 10, 2003.

2. The court in its June 10, 2003, order erred when it held that the magistrate judge's legal analysis of the issues raised by The United States (on behalf of the Small Business Administration) appeared to the court to be entirely correct. (Court opinion, p. 3) On pages 9 through 11 of the order and recommendation of United States Magistrate Judge, the magistrate concluded that plaintiff erroneously neglected to file a claim within two years of the time when her cause of action arose (November 24, 1997), and otherwise to comply with the Federal Tort Claims Act. (Magistrate's Order and Recommendation, p. 11) All of this when plaintiff's cause of action was based on misrepresentation (Complaint, pp. 5-7, ¶¶ 10-16), thereby placing the case under 28 U.S.C. § 2680 (h). The effect of this case falling under 28 U.S.C. § 2680 (h) took this entire case out of the Federal Tort Claims Act and 28 U.S.C. § 1346 (b). This case accordingly came under 15 U.S.C. § 634 (b)(1), which gave the Administrator of the SBA the power to "sue and be sued in any court of record of a State having general jurisdiction, or in any United States district court, and jurisdiction is conferred upon such district court to determine such controversies without regard to the amount in controversy . . . ." The sovereign immunity was effectively waived in this case.

3. The court having erred on the SBA issues, it continued to err in dismissing all of the other defendants because of the lack of any federal jurisdiction. Without the SBA as a defendant, there is no jurisdiction in the district court. If the SBA is in the suit, there is sufficient jurisdiction for the case to remain in the district court. The remaining defendants would then properly remain in the jurisdiction of the district court.

4. Defendants Walsh and Suelthaus & Walsh should not have been dismissed by the magistrate. Plaintiff well pleaded that the information pertaining to the check kiting activities of defendant Akbani was not communicated to plaintiff, but was known by all of the other defendants. (complaint, p. 6, ¶ 14) Each of the defendants well knew of the check kiting activities of defendant Akbani, but they withheld this information from plaintiff because if she had not been willing to sign the financing papers as guarantor (with her then husband), the refinancing arrangement would not have gone through. (Complaint, p. 6, ¶ 14) Defendants Walsh and Suelthaus & Walsh could not properly claim that they were bound by an attorney client privilege because the check kiting information was known by all the other defendants (but not by plaintiff). There was no confidentiality to be protected by the attorney client privilege. (Magistrate's Order and Recommendation, p. 6)

Dated: June 24, 2003.

Jack F. Allen 63454
Attorney for Plaintiff
7710 Carondelet Avenue # 400
Clayton, Missouri 63105
314.727.1373
Fax 314.727.3853

No. 4:02CV01775 DJS

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

YVONNE M. BOHAC,
Plaintiff

vs.

THOMAS M. WALSH, et al,
Defendants

Filed April 17, 2003

PLAINTIFF'S WRITTEN OBJECTIONS TO MAGISTRATE'S REPORT AND RECOMMENDATION

Plaintiff Yvonne M. Bohac, per Fed.R.Civ.P. 72 (b) and E.D.Mo.L.R. 73-11.01, makes the following written objections to the following recommendations as made by the magistrate, together with the pertinent portions of the discussion, beginning on page 3 of the order and recommendation of United States Magistrate Judge filed on April 3, 2003, but not served on plaintiff until April 7, 2003:

(1) The recommendation that the motion to dismiss of Walsh and Suelthaus & Walsh, Inc. (sic - should be P.C.), (DOC. 29) be granted; (p. 15)

(3) The recommendation that the motion to dismiss or, in the alternative, for summary judgment of The

United States of America, by the Administrator of the Small Business Administration (Doc. 0) be granted. (Ibid.)

II. DISCUSSION

A. Walsh and Suelthaus & Walsh's Motion

In the paragraph at the bottom of page 4 of the order and recommendation (the report and recommendation - the "discussion"), the magistrate noted that the motion of defendants Walsh and Suelthaus & Walsh is exactly "a motion to dismiss," not a motion for summary judgment. Because of the magistrate's discussion, plaintiff will request leave of court to amend the complaint, per Fed.R.Civ.P. 15 (a), to conform with the observations of the magistrate in his discussion. The amendment will include an averment to the effect that because of plaintiff's consultations with Mr. Craig Smith of the firm of Suelthaus & Walsh, P.C., and his advice given to plaintiff, plaintiff was a client of the firm, as was her former husband, defendant Salim I. Akbani, and his corporations, Akbani industries, incorporated, and Sportswear, Incorporated. Therefore, Moffett Brothers Partnership Estate v. Moffett, 137 S.W.2d 507 (Mo. 1934), will be in point.

In the last four lines of page 5 of the discussion, the magistrate states that Mo.S.Ct.R. 4-4.1 is not applicable because plaintiff does not aver that a false statement was made. Similarly, he writes that subparagraph (b) of the same rule was overlooked by plaintiff whether defendants Walsh and Suelthaus & Walsh were prohibited from disclosing the check kiting to her.

We have always contended that Mo.S.Ct.R. 4-4.1 was applicable, but the basis of our complaint is that the fraud was not made in the form of overt statements, but instead, the fraud was in the form of "silence."

The publication of Corpus Juris Secundum is not looked upon by all as being as good an authority as others may be. However, 37 C.J.S. § 18, p. 198, through § 22, p. 204 (Supp. to 2003) contains a good treatment of when silence or concealment can constitute fraud.

> Fraud may consist in concealment, but mere silence in the absence of a duty to speak is not sufficient. (Id. at § 18, p. 198) The concealment of a material fact may be equivalent to a false representation and be sufficient upon which to predicate a charge of fraud. (Ibid.) If someone says or does something to avert inquiry, he is guilty of fraudulent concealment. (Id. at p. 199)
>
> Where the particular circumstances impose on a person a duty to speak and he deliberately remains silent, his silence is equivalent to a false representation. (Id. at § 19, pp. 199-200)
>
> A person who injects himself into a business transaction incurs a duty to disclose all material information necessary to prevent the representations he makes, either directly or indirectly, from misleading other parties to the transaction. (Id. at p. 200)

Where the parties deal at arm's length and their relations are not confidential, silence is not fraud. This is particularly true where the facts are equally within the means of knowledge of both parties. (Id. at § 20, p. 200) It is generally held that a deliberate failure to correct a delusion may constitute fraud. (Id. at 201) if a party conceals a material fact knowing that the other party is acting on the assumption that no such fact exists, the concealment is as much a fraud as though the existence of the fact was expressly denied or the reverse of it expressly stated. (Ibid.)

Where one person seeks information from another, the latter may either refuse to give any information or he must make a full and truthful disclosure which shall have no tendency to deceive or mislead. One who conveys a false impression by the disclosure of some facts and the concealment of others is guilty of fraud, although his statement is true as far as it goes. (Id. at § 21, p. 201)

A duty to speak may arise from partial disclosure. The speaker must tell the whole truth although he might have said nothing. One conveying a false impression by the disclosure of some facts and the concealment of others is guilty of fraud, even though his statement is true as far as it goes. (Id. at p. 202)

> Finally, where a relation of trust and confidence obtains between the parties, there is a duty to disclose all material facts, and failure to do so constitutes fraud. (Id. at § 22, p. 202) No general rule can be formulated which will fix under all circumstances the existence of a relation of trust and confidence. (Ibid.) If there is such a relation, there is a duty to disclose all material facts, and the failure to do so constitutes fraud. (Id. at 202-03) It does not require a strict fiduciary relationship in all cases. (Id. at 203)
>
> Relations which have been held to be confidential so as to impose a duty to reveal all facts material to the transaction involved are attorney and client and borrower and lender. (Id. at § 22, p. 203).

Based on the foregoing, it can be readily seen that defendants Walsh and Suelthaus & Walsh committed a fraud on plaintiff to her damage when they withheld from plaintiff the information about defendant Akbani's bank fraud (check kiting). It strains the credulity to think that defendant Akbani did not tell defendants Walsh and Suelthaus & Walsh to withhold this information from his then-wife.

Lockette v. American Broadcasting Companies, 118 F.R.D. 88, 91 (N.D.Ill. 1987) cannot be applicable. We aver in ¶ 14 of the original nomplaint that. "each of defendants well knew of the check kiting activities of defendant Salim I. Akbani, so the confidential communication which may once have existed among

defendants Akbani, Walsh And Suelthaus & Walsh was no longer a reality.

Finally, the magistrate in the last two paragraphs of his discussion (on p. 6) touches upon Mo.S.Ct.R. 4-1.6 and 4-4.1 and Chrysler Corporation v. Carey, 5 F.Supp.2d 1023 (E.D.Mo. 1998).

It should be realized that although Chrysler stands for the proposition that a violation of an ethical rule cannot be the basis for imposing tort liability, defendants Walsh and Suelthaus & Walsh were the first to raise Mo.S.Ct.R. 4-1.6 as an affirmative defense. It stands to reason that if Chrysler is correct, if an ethical rule cannot be the basis for imposing tort liability, by the name token these defendants should not be allowed to use an ethical rule as an affirmative defense.

However, defendants having "opened the door," plaintiff is entitled to raise Rule 4-4.1. Rule 4-4.1 specifically says that "In the course of representing of a client, a lawyer shall not knowingly: (a) make a false statement of material fact or law to a third person or (b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client unless disclosure is prohibited by Rule 1.6."

As stated above under our discussion of Lockette, since all defendants knew of the check kiting (the two banks were the victims of Akbani's bank fraud [check kiting]), Rule 4-1.6 cannot apply. The confidentiality of the communication no longer existed.

We contend that defendant Akbani's conduct in obtaining his then-wife's written guarantee on financing papers for his benefit without her being told of her husband's check kiting (bank fraud) is fraud by the client, Salim I. Akbani, and defendants Walsh and Suelthaus & Walsh in failing to disclose a material fact. They assisted in a fraudulent act by Mr. Akbani.

C. SBA's Motion

Before getting to the merits of plaintiff's objections, an underlying problem is why should plaintiff be interested in suing the Small Business Administration (The United States), if under 15 U.S.C. § 634 (b)(1)

> . . . The Administrator (of SBA) can sue and be sued in any court of record of a State having general jurisdiction, or in any United States district court, and jurisdiction is conferred upon such district court to determine such controversies without regard to the amount in controversy, but no attachment injunction. garnishment or other similar process, mesne or final, shall be issued against the administrator or his property."

(Emphasis added.)

If plaintiff is successful in obtaining a judgment against SBA, what effect could it have? We contend that it is very important, since with a judgment against SBA, plaintiff would have a set-off against SBA, which currently claims an indebtedness against plaintiff of

$80,000+, (sic - should be $800,000+) which presumably would have to be a compulsory counterclaim. [Fed.R.Civ.P. 13 (a)] Subparagraph (d) of Rule 13 has no application to the present case.

Presently, SBA is asserting various collection devices against plaintiff, including the offset from plaintiff's federal income tax refunds.

-oOo-

The magistrate attempts to cite on p. 10 "an important statute not cited by plaintiff," 28 U.S.C. § 2671 (a) [sic - it should be 28 U.S.C. § 2679 (a)]. 28 U.S.C. § 2679, which is entitled "Exclusiveness of remedy," does not pertain to SBA. Subsection (a) is limited to a federal agency which can sue and be sued "in its own name." (Emphasis added.) SBA has no authority to sue or be sued "in its own name." SBA is not an independent agency, but a part of The United States, and actions against SBA are not brought "in its own name," but instead are in the name of "The United States." This is acknowledged by both plaintiff and the magistrate. The magistrate's recommendation speaks "of the United States of America, by the Administrator of the Small Business Administration." (p. 15)

28 U.S.C. § 1346 (b)(1) also does not apply to the present case, by virtue of 28 U.S.C. § 2680 including subsection (h).

28 U.S.C. 2680, titled "Exceptions," provides that:

> The provisions of this chapter and § 1346 (b) of this title shall not apply to -

. . .

> (h) any claim arising out of . . . misrepresentation, deceit . . . . (Emphasis added.)

Not only is the Federal Tort Claims Act made inapplicable to the present case, which involves misrepresentation and deceit, but 28 U.S.C. § 1346 (b) similarly does not apply the present case, since again the present case involves misrepresentation and deceit (fraud). (Emphasis added.)

The magistrate's statement in the last paragraph of his discussion on SBA's motion (page 11) "that § 2680 merely lists claims to which the FTCA's limited waiver of sovereign immunity does not apply" is not correct. 28 U.S.C. § 2681 (sic - should be § 2680) lists exceptions to the FTCA, together with 28 U.S.C. § 1346 (b). § 2681 (sic - should be § 2680) does not grant jurisdiction to this court, but it does take the present case out of the FTCA - with the onerous requirement that a claim be filed within two years. 28 U.S.C. § 2401 (b) and 2675 (a).

The magistrate refers to 28 U.S.C. § 2671 (a) in the middle of page 10 as placing plaintiff's claim under the FTCA because her claim "sounds in tort." First, the proper section is not § 2671, but § 2674. (§ 2674 has no numbered or lettered subsection.) It only states that "The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances . . . ." Admittedly fraudulent misrepresentation sounds in tort, but fraudulent misrepresentation also falls under § 2680,

which as stated above excepts from FTCA and 28 U.S.C. § 1346 (b) actions arising out of misrepresentation or deceit.

Where are we?

We contend that jurisdiction is properly placed in the United States District Court under 15 U.S.C. § 634 (b)(1) ("and jurisdiction is conferred upon such district court to determine such controversies without regard to the amount in controversy . . . ."). This statement is subject to none of the exceptions mentioned by the magistrate, and plaintiff is not subject to the requirements of the Federal Tort Claims Act.

As for make weight, we have 28 U.S.C. § 1331:

> Federal question. The district courts shall have original jurisdiction of all civil actions arising under the constitution, laws or treaties of The United States.

The present case deals with many intricate financing papers, all of which SBA participated in, purportedly in accordance with the pertinent federal laws. § 1331 might not be necessary to place jurisdiction in the district court, but at least it does not contravene 15 U.S.C. § 634 (b)(1).

CONCLUSION

Based on the foregoing, we contend that the magistrate's recommendations (1) and (3) are in error, and both of them should be changed to conform with the views and authorities expressed in plaintiff's

written objections to magistrate's report and recommendation

Dated: April 17, 2003.

Jack F. Allen 63454
Attorney for Plaintiff
7710 Carondelet Avenue # 400
Clayton, Missouri 63105
314.727.1373
Fax 314.727.3853

No. 4:02 CV 1775 DDN

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

YVONNE M. BOHAC
Plaintiff,

v.

THOMAS M. WALSH, et al.,
Defendants.

Filed April 3, 2003

ORDER AND RECOMMENDATION
OF UNITED STATES MAGISTRATE JUDGE

This action is before the court upon various defendants, motions to dismiss or for summary judgment. The action was referred to the undersigned United States Magistrate Judge for a recommended disposition under 28 U.S.C. § 636(b). fn1 Oral argument was heard on March 12, 2003.

I. BACKGROUND

On November 25, 2002, plaintiff Yvonne M. Bohac commenced this action against defendants Thomas M. Walsh; Suelthaus & Walsh, P.C. (Suelthaus & Walsh or law firm); First National Bank of the MidSouth (First National); fn2 The Bank of Advance (Advance); Missouri Department of Economic Development (DED); Salim I. Akbani (Akbani); Akbani Industries,

Inc. (Akbani Industries); Sportswear, Incorporated (Sportswear) ; and the United States of America, by the Administrator of the Small Business Administration (SBA). (Doc. 1 at 2-3.)

Plaintiff alleges the following regarding her action, which she asserts "arose under 28 U.S.C. § 1346(b) and 15 U.S.C. 636(b)(1) [sic – should be § 634(b)(1)." Plaintiff and Akbani are Illinois residents. Their marriage of thirteen years was dissolved in May 1997. Defendant Walsh, an attorney, who is licensed and resides in Missouri, practices with Suelthaus & Walsh. Walsh and the law firm have also represented Akbani, Akbani Industries, Inc., and Sportswear, Inc. First National and Advance, which are located in Missouri, arranged financing for the benefit of Akbani, in connection with Akbani Industries and Sportswear, which were owned by Akbani. SBA also arranged financing for Akbani in connection with his two corporations. The Missouri Secretary of State administratively dissolved Akbani Industries and Sportswear on September 2, 1993, and August 31, 1998, respectively. (Id. at 3-4.)

Plaintiff alleges that in 1994 SBA declared its note, given by Akbani and his two corporations, to be in default, thereby causing "the business" to be shut down temporarily. Advance and "others" arranged a refinancing. In January and February 1995, plaintiff was called into Suelthaus & Walsh's offices to sign various financial papers for new guarantees. Walsh and "another" told plaintiff that, if she did not sign the papers, Akbani would be jailed for defaulting on the loan. "Also, [SBA, Advance, and DED] wanted to keep the people (employees of Akbani Industries and Sportswear) working and off of welfare." (Id at 5.)

Plaintiff alleges that, relying on these representations, plaintiff signed several financial papers as a guarantor. Defendants had not told her that Akbani had been engaging in bank fraud, i.e., check kiting, from October through December 1994, in connection with the operation of his two corporations. Each defendant "well knew" of Akbani's check-kiting activities but withheld this information from plaintiff because the refinancing scheme would not have gone through without her signing the financing papers as a guarantor. She "had no fair and reasonable way of knowing of the check kiting by Salim I. Akbani, nor did she know of (his] conviction until November 24, 1997." Had she known of the check kiting, she would not have signed the guarantees. (Id. at 5-6.)

She alleges that in 1998, creditors foreclosed on the properties of plaintiff, Akbani, and his two corporations. Akbani filed Chapter 7 bankruptcy, but many of his debts were not dischargeable. Plaintiff's damages include "the $1,948,767 which she was seduced to guarantee." (Id. at 7.)

II. DISCUSSION

A. Walsh and Suelthaus & Walsh's motion

Defendants Walsh and Suelthaus & Walsh jointly move to dismiss, arguing that plaintiff's complaint (1) is time-barred by Missouri's 5-year statute of limitations, and (2) fails to state a cause of action because they owed no duty to disclose to plaintiff, a non-client. (Doc. 29 (Mot. to Dismiss).)

Plaintiff responds that the complaint was timely filed on November 25, 2002, because November 24, 2002, fell on a Sunday. Next, she disputes that Walsh and Suelthaus & Walsh could not disclose to her that Akbani had been kiting checks and had been indicted and convicted in connection with his businesses, because (1) Craig A. Smith, a member of Suelthaus & Walsh, had given advice to plaintiff and her husband over the years, and (2) Missouri Supreme Court Rule 4-4.1, taken from the American Bar Association's Rules of Professional Misconduct, prohibits a lawyer from failing to disclose a material fact to a third person when disclosure is necessary to avoid assisting a fraudulent act by a client. Plaintiff cites Moffett Bros. P'ship Estate v. Moffett, 345 Mo. 507, 511 (Mo. 1939), for the proposition that an attorney cannot prejudice one client for the benefit of another. (Doc. 29 (Pl.'s Mem. in Supp. of Resp.).) She attaches excerpts from a December 19, 1996 deposition of Smith, which was taken in connection with a state case. Smith testified that his firm had given plaintiff some advice over the years, including financial advice. (Doc. 29 (Pl.'s Answer) Attach.)

In their reply, Walsh and the law firm concede that the complaint is not time barred if plaintiff's pleadings are taken as true. Next, they urge the court not to consider Smith's deposition transcript, because it is scant and vague and adds nothing to the issue of whether plaintiff's claims are cognizable. They maintain that (1) plaintiff's reliance on Moffett is misplaced, (2) she misapplies Rule 4-4.1, and (3) the violation of an ethical rule does not create a private cause of action. (Doc. 29 (Reply).)

As Walsh and the law firm recognize, plaintiff's complaint is timely because, under Missouri law, when the final day of the 5 year filing period falls on a Sunday, the statute of limitations is enlarged until the following court day. See Mo. Rev. Stat. § 516.120(5) (an action for relief on the ground of fraud shall be commenced within 5-years); Mo. S. Ct. R. 44.01(a) (the last day of a period prescribed by an applicable statute is to be included, unless it is a Saturday, Sunday or legal holiday, in which event the period runs until the end of the next day which is neither a Saturday, Sunday nor legal holiday).

Before addressing whether plaintiff's complaint should be dismissed for failure to state a claim, the undersigned emphasizes that the motion to dismiss by Walsh and Suelthaus & Walsh is exactly that--a motion to dismiss--not a motion for summary judgment. Although a motion to dismiss shall be treated as one for summary judgment when matters outside the pleadings "are presented to and not excluded by the court," see Fed. R. Civ. P. 12(b) (emphasis added), "Rule 12(b) (6) motions are not automatically converted into motions for summary judgment simply because one party submits additional matters in support of or [in] opposition to the motion." Missouri ex rel. Nixon v. Coeur D'Alene Tribe, 164 F.3d 1102, 1107 (8th Cir.), cert. denied, 527 U.S. 1039 (1999). In this case, there is no need to rely on plaintiff's attachment in order to determine whether she stated a claim. See Casazza v. Kiser, 313 F.3d 414, 418 (8th Cir. 2002) ("[A] district court does not convert a motion to dismiss into a motion for summary judgment when it does not rely upon an [attachment] in dismissing a claim, . . . or when the

district court makes clear that it ruled only on the motion to dismiss.").

Turning to the merits, the undersigned recommends granting the motion to dismiss for failure to state a claim. See Fed. R. Civ. P. 12(b)(6). Because the complaint does not allege that plaintiff was a client of Walsh and Suelthaus & Walsh, her reliance on Moffett is misplaced. See Moffett, 345 Mo. at 511 Instead she simply alleges that she was called into Suelthaus & Walsh's office to sign financing papers and was told by Walsh (and another) that if she did not sign the papers Akbani would go to jail.

In addition, she misapplies Rule 4-4.1, which provides that

> In the course of representing a client a lawyer shall not knowingly:
>
> (a) make a false statement of material fact or law to a third person; or
>
> (b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

Mo. S. Ct. R. 4-4.1. Rule 4-4.1(a) is inapplicable, because plaintiff does not allege that a false statement was made. With respect to paragraph (b), she overlooks whether Walsh and Suelthaus & Walsh were prohibited from disclosing check kiting to her. They were. See Lockette v. Am. Broad. Cos., 118 F.R.D. 88, 91 (N.D. Ill.

1987) (once the attorney believed that his client had committed a past crime, he was justified, and in fact bound, not to reveal that fact).

Missouri Supreme Court Rule 4-1.6, titled "Confidentiality of Information," provides that "[a] lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraph (b)." Mo. S. Ct. R. 1.6(a). Plaintiff has not alleged that Akbani consented to the disclosure, and paragraph (b)'s exceptions, e.g., to prevent the client from committing a criminal act likely to result in imminent death, are inapplicable. See Mo. S. Ct. R. 1.6(b).

Finally, even if Rule 4-4.1 had been violated, "[v]iolation of a Rule should not give rise to a cause of action nor should it create any presumption that a legal duty has been breached." Mo. S. Ct. R. 4, Scope at 19; cf. Chrysler Corp. v. Carey, 5 F. Supp. 2d 1023, 1031 (E.D. Mo. 1998) (the fact that defendants may have violated a conflict-of-interest rule, is not, in and of itself, a basis for imposing tort liability).

B. Missouri Department of Economic Development's motion

Defendant DED seeks dismissal under Federal Rule of Civil Procedure 12(b)(1) for lack of subject matter jurisdiction, arguing that the Eleventh Amendment bars plaintiff's action against it. (Doc. 32.) Plaintiff responds that the Eleventh Amendment does not affect this action because of Missouri Revised Statutes §§

361.020, 620.010, and The Omnibus State Reorganization Act of 1974 (OSRA). (Doc. 53.) DED replies that (1) it is a state agency entitled to invoke the Eleventh Amendment, citing Coller v. Mo. Dep't of Econ. Dev., 965 F. Supp. 1270, 1277 (W.D. Mo. 1997); (2) a state "does not consent to suit in federal court merely by stating its intentions to 'sue and be sued,' . . . or even by authorizing suits against it 'in any court of competent jurisdiction,'" quoting Coll. Savs. Bank v. Fla. Prepaid Postsecondary Educ. Expens Bd., 527 U.S. 666, 676 (1999) (citing Fla. Dept of Health & Rehabilitative Servs. v. Fla. Nursing Home Ass'n, 450 U.S. 147, 149-50 (1981) (per curiam), and Kennecott Copper Corp. v. State Tax Comm'n, 327 U.S. 573. 577-79 (1946));. and (3) the fact that under § 361.020 a director "may" bring and defend actions cannot reasonably be construed as an unequivocal consent by DED to defend against plaintiff's action in federal court. (Doc. 55.)

"The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. Const. amend. XI. The Supreme Court has long construed this language to bar citizens from bringing suit against their own state in federal court. See, e.g., Hans v. Louisiana, 134 U.S. 1 (1890). The Eleventh Amendment applies not only to states but to state departments as well. See Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 100 (1984). A state may waive immunity, however, by invoking the jurisdiction of a federal court or by making a "clear declaration" of its intent to submit to federal jurisdiction. See Entergy, Ark.. Inc. v. Nebraska, 210

F.3d 887, 896-97 (8th Cir.,. 2000). The second of the two waiver possibilities is at issue in this case.

Section 620.010, which created DED, used a "type II transfer" to give DED the powers, duties, and functions previously vested in the Missouri Division of Finance by, inter alia, chapter 361. fn3 See Mo. Rev. Stat. § 620.010.8. Under § 361.020.2, "[t]he director of finance may institute, in the name of the state of Missouri, and defend suits in the courts of this state and the United States." Mo. Rev. Stat. § 361.020.2. Coller--which simply held that "[b]ecause DED is a state agency, it may invoke the Eleventh Amendment in order to protect the state treasury from liability," 965 F. Supp. at 1277--is of limited use to the issue at hand, because that case does not address whether § 361.020.2 includes a clear declaration of intent to submit DED to federal jurisdiction.

In Florida Nursing Home, the Supreme Court considered whether the "sue and be sued" language in a Florida statute constituted a waiver of immunity from suit in federal court. 450 U.S. at 149. That statute included a statement that the Department of Health and Human Services "shall have the power to contract and be contracted with, to sue and be sued in actions in ex contractu but not in torts." Fla. Stat. § 402.34 (1979). The Court concluded that Florida's "general waiver" of sovereign immunity for the department did not constitute a waiver by the state of its constitutional immunity under the Eleventh Amendment from suit in federal court. 450 U.S. at 150.

Similarly, in Kennecott Copper, the Court considered a Utah statute authorizing taxpayers to pay their taxes

under protest and "'thereafter bring an action in any court of competent jurisdiction for the return thereof.'" 327 U.S. at 575, n.1 (quoting Utah Code Ann. § 80-5-76 (1943)). The Court held that although the statute undoubtedly provided for suit against Utah in its own courts, the statute fell short of the required clear declaration by a state of its consent to be sued in the federal courts. Id. at 576.

In Kimel v. Fla. Bd. of Regents, 528 U.S. 62 (2000), the Court looked at a provision of the Fair Labor Standards Act, which provides that certain types of actions "may be maintained against any employer (including a public agency) in any Federal or state court of competent jurisdiction." 29 U.S.C. § 216 (b). Emphasizing § 216 (b)'s "any Federal or State court" language, the Court concluded that the statute "eliminates the ambiguity identified in Kennecott Copper--whether Utah intended to permit suits against the sovereign in state court only, or in state and federal court." 528 U.S. at 75. Thus, the Court found that the choice o£ language in 216(b) sufficiently indicated Congress's intent to abrogate the States' Eleventh Amendment immunity to suits by individuals. Id. at 75-76.

In light of the view the Court expressed in Kimel regarding 216(b)'s permissive "may be maintained" language, Missouri's use of "may" in § 361.020.2 must be construed as an unequivocal consent to suit in federal court. See also United States v. Q Int'l Courier, Inc., 131 F.3d 770, 775 (8th Cir. 1997) (39 U.S.C. § 401(1), which states that "[t]he Postal Service shall have the . . . powers . . . to sue and be sued in its official name," operates to waive the government's traditional

sovereign immunity). Therefore, the motion of the state department to dismiss should be denied.

C. SBA's motion

In lieu of an answer, SBA moved to dismiss or, in the alternative, for summary judgment, arguing that plaintiff (1) failed to plead waiver of sovereign immunity or the basis for subject matter jurisdiction, (2) failed to file her administrative claim with the appropriate agency within the two-year statute of limitations of the Federal Tort Claims Act (FTCA), 28 U.S.C. §§ 1346(b), 2671-2680, (3) alleged causes of action that are specifically excluded from the FTCA and for which the United States has not waived sovereign immunity, and (4) failed to state a claim under Rule 12(b)(6). (Doc 0 (filed Jan. 31, 2003).)

Plaintiff responds that § 634(b)(1)'s sue-and-be-sued clause provides a limited waiver of sovereign immunity and confers jurisdiction to federal courts over suits against SBA. (Doc 0 (Pl.'s Resp.).)SBA, in turn, replies that plaintiff's reliance on the sue-and-be-sued clause is misplaced and does not cure her complaint's jurisdictional defects. (Doc 0 (SBA's Reply).)

Plaintiff mentioned only two statutes in her complaint. Section 634(b) (1) provides that SBA may "sue and be sued in . . . any United States district court, and jurisdiction is conferred upon such district court to determine such controversies without regard to the amount in controversy." 15 U.S.C. § 634 (b)(1). Section 1346(b)(1) provides:

> Subject to the provisions of chapter 171 of this title [(28 U.S.C. §§ 2671-2680)], the district courts . . . shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages . . . caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment . . . .

28 U.S.C. § 1346(b)(1). An important statute not cited by plaintiff, titled "Exclusiveness of Remedy," states that "[t]he authority of any federal agency to sue and be sued in its own name shall not be construed to authorize suits against such federal agency on claims which are cognizable under section 1346(b) . . . , and the remedies provided by this title [(the FTCA)] in such cases shall be exclusive." 28 U.S.C. § 2671(a).

Plaintiff's claim against SBA sounds in tort (i.e., fraudulent misrepresentation) and is thus governed by the FTCA, as stated in § 2671 (a). Cf. Peak v. SBA, 660 F.2d 375, 378 (8th Cir. 1981) ("The FTCA is the exclusive remedy for actions sounding in tort, and this is expressly so despite the statutory authority of any federal agency 'to sue and be sued.'"); Boedeker v. Dent of Treasury, No. 4:98CV1360, 1999 WL 236596, at *2 (E.D. Mo. Mar. 10, 1999).

An action for money damages may not be commenced in federal court under the FTCA, however, unless the plaintiff has first presented the claim to the appropriate federal agency, and that claim has been denied. See 28 U.S.C.§ 2675 (a). Further, "[a] tort claim against the United States shall be forever barred unless it is

presented in writing to the appropriate Federal agency within two years after such claim accrues." 28 U.S.C. § 2401(b). Because plaintiff has not demonstrated, nor even alleged, exhaustion of her administrative remedies, the undersigned concludes that her suit is barred. See, McNeil v. United States, 508 U.S. 106, 113 (1993) ("The FTCA bars claimants from bringing suit in federal court until they have exhausted their administrative remedies.") ; Finklea v. United States, NO. Civ. A. 00-0286-CBM, 2001 WL 103005, at *4 (S.D. Ala, Jan. 30, 2001) (dismissing for lack of jurisdiction because the plaintiffs failed to plead or establish any facts that would establish a waiver of sovereign immunity and failed to allege that an administrative claim wan filed first). To the contrary, she alleged in her complaint that she knew of the check kiting as far back as November 24, 1997. see Stone Motor Co. v. Gen. Motors Corp., 293 F.3d 456, 465 (8th Cir. 2002) dismissal under Rule 12(b) (6) is likely to be granted in the unusual case in which a plaintiff includes allegations that show on the face of the complaint some insuperable bar to relief).

Although at oral argument plaintiff seemed to sugqest that 28 U.S.C. § 2680 establishes jurisdiction in this case, § 2680, as indicated by its title, "Exceptions," merely lists claims to which the FTCA's limited waiver of sovereign immunity does not apply. Thece exceptions include "[a]ny claim arising out of ... misrepresentation, deceit, or interference with contract rights." 26 U.S.C.§ 2680 (h). Thus, § 2680 does not save plaintiff's complaint from dismissal.

D. Advance's motion

In its motion to dismiss under Rule 12(b)(6), Advance characterizes plaintiff's complaint as an attempt to assert a claim for fraud, then argues that she failed to plead the claim with particularity, as required by federal and state law. (Doc. 30 (Mot. to Dismiss).) Plaintiff responds that Advance fails to identify where her averments do not fullfill Rule 9(b)'s particularity requirement. She asserts that her complaint alleged when, where, and by whom the misrepresentations were made; the particular contents of the misrepresentations; and the consequences of the misrepresentations. (Doc. 30 (Pl.'s Resp.).)

The Federal Rules of Civil Procedure require that "[in] all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." Fed. R. Civ. P. 9(b). Similarly, in Missouri, every essential element of fraud must be pled; failure to plead any element renders the claim subject to dismissal. See Manzer v. Sanchez, 985 S.W.2d 936, 940 (Mo. Ct. App. 1999). "All averments of fraud are to be stated with particularity, except malice, intent, knowledge and any other condition Qt mind which can be averred generally." Id. (siting Mo. S. Ct. R. 55.15). In Missouri, the elements of fraud are

(1) a representation; (2) its falsity; (3) its materiality; (4) the speaker's knowledge of the falsity or his ignorance of the truth; (5) the speaker's intent that his representation should be acted upon by the hearer and in the manner reasonably contemplated, (6) the hearer's ignorance of the falsity of the representation; (7) the hearer's reliance on the truth of the representation; (8)

the hearer's right to rely thereon; and (9) the hearer's consequent and proximately caused injury.

Id. at 941.

Plaintiff failed to allege that Advance made a representation. Her allegation that Walsh and "another" told her that Akbani would go to jail if she did not sign the loan papers is too vague to justify interpreting "another" as Advance, given that plaintiff is suing nine defendants. Cf. Dietrich v. Bauer, 76 F. Supp. 2d 312, 329 (S.D.N.Y. 1999) (Rule 9(b) is not satisfied by a complaint in which defendants are clumped together in vague allegations). Her allegation that Advance and DED "wanted to keep the people . . . working and off of welfare" fails to make clear who, if anyone, told her that Advance and DED wanted to prevent layoffs. Even if plaintiff had sufficiently pleaded that Advance made a representation to her, she did not allege falsity.

The fraud analysis does not end here if Advance had a duty to disclose Akbani's check-kiting activities. See McMahon v. Meredith Corp., 595 F.2d 433, 438-39 (8th Cir. 1979) ("A failure to disclose a material fact can be considered to be an implicit representation of the nonexistence of such fact on which a party may rely, but only if the alleged fraud-feasor has a duty to speak." (citing Missouri cases)). Whether a duty to speak exists implicates the same considerations which underlie elements six, seven, and eight of the general elements of fraud. See id. at 439. "Missouri courts have consistently held that a duty to speak may arise under any of three conditions: (1) where there is a fiduciary relationship between the parties or a relationship of

confidence; (2) where there is an inequality of condition between the parties; and (3) where one party has superior knowledge not within the fair and reasonable reach of the other party." Id.

The first of the duty-to-speak conditions has not been satisfied, because "'[t]here is no confidential or fiduciary relationship between a bank and a customer borrowing funds.'" Metro, 34 F.3d 589, 594 (8th Cir. 1994) (quoting Centerre Bank of Kansas City v. Distribs., Inc., 705 S.W.2d 42, 53 (Mo. Ct. App. 1985)). Plaintiff does not allege any facts satisfying the second condition; however, she does allege that each defendant knew of Akbani's check kiting and that she had "no fair and reasonable way of knowing of the check kiting" when she signed the loan guarantees. Thus, the undersigned believes that plaintiff's fraud claim against Advance should not be dismissed for want of particularity.

E. Akbani's motion

In his pro se motion to dismiss, Akbani argues that plaintiff's complaint is time barred by the 5-year statute of limitations and that plaintiff was aware of the situation before November 24, 1997. He adds that the instant action is frivolous, asserting that plaintiff's counsel brought it without proper cause and due diligence. (Doc. 50.)

The undersigned recommends denying Akbani's motion because, as already discussed (supra II(A)), the statute of limitations was enlarged until November 25, 2002. See Mo. Rev. Stat. § 516.120(5); Mo. S. Ct. R. 44.01(a). Although Akbani asserts that plaintiff learned of the

check kiting before November 24, 1997, such a factual dispute, if supported, would be more appropriate in a motion for summary judgment. See Casazza v. Kiser, 313 F.3d 414, 418 (8th Cir. 2002) (the court must accept the complaint's allegations as true and dismiss only when "'it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief'" (quoting Conley v. Gibson, 355 U.S. 41, 45-46 (1957)).

Akbani's frivolity argument is misplaced, because failure to state a claim--not frivolousness--is the appropriate inquiry in a fee-paid action such as this one. See generally Neitzke v. Williams 490 U.S. 319, 325-31 (1989) (delineating the differences between claims which are frivolous under 28 U.S.C. § 1915 (d) and those which fail to state a claim under Fed. R. Civ. P. 12(b)(6)). In any event, Akbani's statement that plaintiff's action was brought without proper cause and due diligence lacks specificity and ie conclusory.

F. The motions of Akbani Industries and Sportswear

Although Akbani attempted to enter his appearance on behalf of Akbani Industries and Sportswear (Docs. 45-46), he did not include an attorney registration number in any court filing, nothing in the record suggests that he is an attorney, and he has not moved to appear pro hac vice. See E.D. Mo. L.R. 83-12.01 (A), (E), (G). fn4 The motions to dismiss of Akbani Industries and Sportswear (Docs. 51-52) are not properly before the court, because "a corporation cannot appear pro se." United States v. Van Stelton, 988 F.2d 70, 70 (sic) (8th Cir. 1993) (per curiam) ; accord Carr Enters., Inc. v.

United States, 698 F.2d 952, 953 (8th Cir. 1983) (per curiam) ("It is settled law that a corporation may be represented only by licensed counsel.").

For the reasons set forth above,

ORDER

IT IS HEREBY ORDERED that the Clerk shall reassign this action to a District Judge under the random assignment process.

RECOMMENDATION

IT IS HEREBY RECOMMENDED that:

(1) the motion to dismiss of Walsh and Suelthaus & Walsh, Inc. (Doc. 29), be granted;

(2) the motion to dismiss of Missouri Department of Economic Development (Doc. 32) be denied;

(3) the motion to dismiss or, in the alternative, for summary judgment of the United States of America, by the Administrator of the Small Business Administration (Doc. 0) be granted;

(4) the motion to dismiss of The Bank of Advance (Doc. 30) be denied;

(5) the motion to dismiss of Salim I. Akbani (Doc. 50) be denied;

(6) the motion to dismiss of Akbani Industries, Inca (Doc. 52), be denied as improperly filed; and

(7) the motion to dismiss of Sportswear, Incorporated (Doc. 51), be denied as improperly filed.

The parties are advised that they have ten (10) days in which to file written objections to this Report and Recommendation. The failure to file timely written objections may waive the right to appeal issues of fact.

DAVID D. NOCE
UNITED STATES MAGISTRATE JUDGE

Signed this 3rd day of April, 2003.

Footnotes

fn1 Some, but not all, of the parties have filed written Magistrate Judge consents under § 636(c). Because of the status of defendants Akbani Industries, Inc., and Sportswear Incorporated, it may be unlikely that these defendants will be able to file such consents. Therefore, the undersigned will order the Clerk to assign this action to a District Judge by the random selection process.

fn2 Montgomery First National Bank, N.A., was wrongly named as First National Bank of the Mid-South. (Doc 23 at 1.)

fn3 A type II transfer, under the OSRA, § 7(b), transfers a division in its entirety.

fn4 Moreover, Akbani did not physically appear at the March 12, 2003 oral argument.

No. 4:02 CV 01775 DDN

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

YVONNE M. BOHAC,
Plaintiff

vs.

THOMAS M. WALSH
7733 Forsyth Boulevard # 1200
Clayton, Saint Louis County
Missouri 63105;

SUELTHAUS & WALSH, P.C.
c/o Kenneth H. Suelthaus,
its registered agent
7733 Forsyth Boulevard # 1200
Clayton, Saint Louis County
Missouri 63105;

FIRST NATIONAL BANK
OF THE MID-SOUTH
c/o Phil Lyon, an officer of the bank
1 First National Bank Plaza
Sikeston, Scott County,
Missouri 63801;

THE BANK OF ADVANCE
105 East Gabriel
c/o Harold Miles, its president
Advance, Stoddard County
Missouri 64730-0400

MISSOURI DEPARTMENT OF
ECONOMIC DEVELOPMENT
c/o its chief executive officer
301 West High Street # 680
Jefferson City, Missouri 65102;

SALIM I. AKBANI
c/o Gateway Classic Cars
5401 Collinsville Road
Fairmont City, Madison County,
Illinois 62201;

AKBANI INDUSTRIES, INCORPORATED
c/o Salim I. Akbani, its president
c/o Gateway Classic Cars
5401 Collinsville Road
Fairmont City, Madison County,
Illinois 62201;

SPORTSWEAR, INCORPORATED
c/o Thomas M. Walsh, it registered agent
7733 Forsyth Boulevard # 1200
Clayton, Saint Louis County
Missouri 63105;

THE UNITED STATES, by the Administrator of the
Small Business Administration, per 15 U.S.C. 634 (b)(1)
c/o Headquarters, Small Business Administration
409 3d Street SW
Washington, D.C. 20416
[via certified mail];

and

c/o Civil Process Clerk at the
Office of the United States Attorney
111 South Tenth Street
Saint Louis, Missouri 63102
[via certified mail];

and

c/o Attorney General of
The United States
Washington, D.C. 20530
[via certified mail]

COMPLAINT FOR DAMAGES

Plaintiff Yvonne M. Bohac, for her cause of action against defendants Thomas M. Walsh, Suelthaus & Walsh, P.C., First National Bank of the Mid-South, The Bank of Advance, Missouri Department of Economic Development, Salim I. Akbani, Akbani Industries, Incorporated, Sportswear, Incorporated and The United States, by the Administrator of the Small Business Administration, states to the court that:

1. Plaintiff is currently a resident of Morris, Grundy County, Illinois. The matters referred to in this complaint for damages occurred in Saint Louis County, Missouri. She had been a resident of Missouri from 1982 to 2000.

2. This action arose under 28 U.S.C. § 1346 (b) and 15 U.S.C. § 634 (b)(1).

3. Defendant Walsh is a duly licensed attorney and counselor at law in the State of Missouri, practicing

with defendant Suelthaus & Walsh, P.C., a law firm in Clayton, Missouri. Defendant Walsh at all times mentioned herein is a resident of Saint Louis County, Missouri. They have also represented defendants Salim I. Akbani, Akbani Industries, Incorporated, and Sportswear, Incorporated.

4. Defendant First National Bank of The Mid-South is a national banking association located in Sikeston, Scott County, Missouri.

5. Defendant The Bank of Advance is a state bank located in Advance, Stoddard County, Missouri.

6. Defendants First National Bank of The Mid-South and The Bank of Advance together and separately arranged financing for the benefit of Salim I. Akbani in connection with Akbani Industries and sportswear, Incorporated.

7. Defendant Missouri Department of Economic Development is a state agency, formed by the State of Missouri, and it arranged financings for defendant Salim I. Akbani in connection with Akbani Industries and Sportswear, Incorporated.

8. Defendant Salim I. Akbani was the husband of plaintiff for some thirteen (sic) years, until their marriage was dissolved in the Saint Louis County, Missouri, Circuit Court on May 22, 1997. He is currently a resident of Saint Clair County, Illinois. He was a resident of Saint Louis County, Missouri, from 1980 to 2001. He was the owner of Akbani Industries and Sportswear, Incorporated, when they were active. The two corporations were dissolved on September 2, 1993,

and August 31, 1998, respectively for failure to file the requisite annual reports Both corporations had maintained offices in Puxico, Stoddard County, Missouri, and in Sikeston, Scott County, Missouri, for the transaction of their annual (sic - should be usual) and customary business when they were active (before their dissolutions).

9. Defendant The United States, by the Administrator of the Small Business Administrator, also arranged financings for defendant Salim I. Akbani in connection with Akbani Industries and Sportswear, Incorporated.

10. In August 1994, defendant Small Business Administration's note, given by defendants Salim I. Akbani, Akbani Industries, Incorporated, and Sportswear, Incorporated, and guaranteed by plaintiff, was declared by the Small Business Administration to be in default. This caused the business to be temporarily shut down. However,. a refinancing was arranged through The Bank of Advance and others, and in January and February, 1995 plaintiff was called into the Suelthaus & Walsh law offices to sign various financing papers, for new guarantees. Plaintiff was told by defendant Walsh and another that if she did not sign the papers, Salim I. Akbani would go to jail for defaulting on the loan. Also, the Small Business Administration, The Bank of Advance and Missouri Department of Economic Development wanted to keep the people (employees of Akbani Industries and Sportswear) working and off of welfare.

11. Acting under those representations, she signed several financing papers only as guarantor. She believed the representations, she had a right to rely on

the representations and did rely on the completeness of the representations.

12. What defendants did not tell plaintiff was that defendant Salim I. Akbani had been engaging in bank fraud (kiting of checks) from approximately October 1994 through part of December 1994. In connection with the operation of the affairs of Akbani Industries, Incorporated, and Sportswear, Incorporated. Had she known of the kiting of checks, she would not have signed the guarantees. Furthermore, she had no fair and reasonable way of knowing of the check kiting by defendant Salim I. Akbani, nor did she know of Mr. Akbani's conviction until November 24, 1997.

13. If plaintiff had known that her then husband, defendant Salim I. Akbani, was engaging in bank fraud (kiting of checks), she never would have signed any of the financing papers.

14. Each of defendants well knew of the check kiting activities of defendant Salim I. Akbani, but they withheld this information from plaintiff because if she had not been willing to sign the financing papers as guarantor (with her then husband), the refinancing scheme would not have gone through.

15. Where defendants as the parties acting in connection with the contract or transaction have superior knowledge, or knowledge which is not within the fair and reasonable reach of plaintiff, and which plaintiff could not discover by exercise of reasonable diligence, or means of knowledge which are not open to all parties alike, defendants are under legal obligation to speak, and their silence constitutes fraud, especially

when plaintiff relies upon defendants to communicate the true state of facts to enable plaintiff to judge the expedience of the bargain.

16. Because of defendant's activities, as set forth above, plaintiff has suffered not only the $1,948,767 which she was seduced to guarantee the obligation to repay, she also has suffered untold damages in connection with the dissolution of her marriage and events occurring after the dissolution, her credit standing is severely and permanently damaged, her ability to obtain employment has been severely impaired and she was not able to maintain her residence in the Parkway School District of Saint Louis County, Missouri, and as a direct result she lost custody of her children, together with other damages.

17. Plaintiff has incurred substantial attorney's fees in the bringing of this suit.

18. In the Spring of 1998, the creditors foreclosed on the properties of plaintiff and defendants Akbani Industries, Incorporated, Sportswear, Incorporated, and Salim I. Akbani. Defendant Salim I. Akbani filed a Chapter 7 bankruptcy, although many debts were not dischargeable because defendant Akbani was ordered to pay the debts by Saint Louis County, Missouri, Circuit Court in connection with the dissolution of his marriage to plaintiff. The two corporations were administratively dissolved by the secretary of state of Missouri. Plaintiff because of the guarantees which were fraudulently obtained by defendants, is claimed as owing hundreds of thousands of dollars. The businesses of the two corporations are defunct.

WHEREFORE, plaintiff requests the court for a judgment against each and every defendant, jointly and severally, for such damages as are fair and reasonable, for costs of court, together with any other appropriate relief the court may deem proper, including reasonable attorney's fees.

Dated: November 25, 2002

Jack F. Allen 63454
Attorney for Plaintiff
7710 Carondelet Avenue # 400
Clayton, Missouri 63105
314.727.1373
Fax 314.727.1373